No. 84-1771

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

NILSON VAN AND STORAGE AND HOWARD A. NILSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's statutorily authorized appeal of an order granting a new trial to a criminal defendant violated the Ex Post Facto Clause where the new trial order was entered before the statutory amendment authorizing such appeals was signed into law.

2. Whether there is a "fraudulent intent" element of the crime of making false statements to the government, 18 U.S.C. 1001, distinct from the requirement that the defendant have knowledge of the falsity of his statement.

3. Whether the question of the materiality of a false statement should be submitted to the jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 755 F.2d 362.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1985. A petition for rehearing was denied on March 18, 1985. The petition for a writ of certiorari was filed on May 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In an indictment filed December 19, 1983, in the United States District Court for the District of South Carolina, petitioners were charged with conspiring to rig bids to the Department of Defense for the storage of household goods for military personnel assigned to overseas duty stations, in

violation of Section 1 of the Sherman Act, 15 U.S.C. 1, with making a false statement to the government by filing a false certificate of noncollusion, in violation of 18 U.S.C. 1001, and with mail fraud, in violation of 18 U.S.C. 1341. After a jury trial, they were convicted on the false statement count and acquitted on the other two counts.

1. The evidence at trial established that petitioner Howard A. Nilson submitted a signed, notarized Certificate of Independent Price Determination to the Army contracting authority that stated that his rates had been computed "independently and without collusion with any other contractor * * * [and] without consultation, communication, or agreement, for the purpose of restricting competition * * * with any other bidder." The certificate also stated that "[u]nless otherwise required by law, the prices which have been quoted in this bid * * * have not been knowingly disclosed by the bidder * * * prior to opening * * * directly or indirectly to any other bidder * * *" and that "[n]o attempt has been made * * * by the bidder * * * to induce any other person or firm to submit or not to submit a bid * * * for the purpose of restricting competition." C.A. App. 289.

Contrary to these representations, Nilson and Matt King, vice-president of petitioner Nilson Van and Storage, had attended a meeting with their competitors sometime prior to May 15, 1980, and had asked their competitors to increase their prices from $12 to $15 per hundredweight (C.A. App. 137-141, 197-199). At least one of Nilson's competitors agreed to the increase before leaving the meeting (*id.* at 141, 203). After the meeting, Nilson and four of its competitors (three of whom had attended the meeting) simultaneously filed identical rate increases from $12 to $15 per hundredweight with the Army contracting authority. GXs 63 through 67. To implement the bidrigging agreement, petitioner Howard Nilson personally collected and

mailed to the Army contracting authority the rate increase letters of two of his competitors (*id.* at 242-243).

2. Before the jury retired, the court gave detailed instructions on the elements of the false statement offense (C.A. App. 268-271). These instructions did not specify "fraudulent intent" as an element of the crime, and petitioners did not object to the intent instruction. The court also informed the jury that the materiality of the statement was a question for the court and instructed the jury that the facts alleged to have been falsified were material (*id.* at 269). The jury returned a guilty verdict on the false statement charge.

After trial, petitioners moved for a judgment of acquittal or, in the alternative, for a new trial on the false statement count on the ground that the trial court had failed to charge the requisite element of intent to defraud. At a hearing held on April 27, 1984, the trial court concluded that, contrary to petitioners' assertion, it had instructed the jury on all the elements of the false statements charge. However, the trial court granted the new trial motion "out of an abundance of caution" because it believed that its instructions had not been stated in the correct "sequential fashion." C.A. App. 60-61; see Pet. App. 3a, 17a-18a.

The government filed a timely motion to reconsider the new trial order on May 9, 1984. While this motion was pending, petitioners moved to dismiss the indictment on the ground that a new trial would violate the Double Jeopardy Clause (C.A. App. 63). The trial court denied the double jeopardy motion, but certified the motion as "not frivolous" and stayed petitioners' retrial to allow them to appeal to the Fourth Circuit (*id.* at 65). Pet. App. 3a-4a.

On September 19, 1984, the trial court denied the government's motion for reconsideration of the new trial order, setting forth new grounds to justify the new trial

(C.A. App. 68-77).[1] It stated that it had omitted the element of "fraudulent intent" from its instructions on the elements of a false statement offense, and it concluded that this omission, although not objected to at trial, was plain error (*id.* at 70). The trial court also expressed its view that, while most courts have held that materiality is a question of law to be determined by the court (*id.* at 76): "it would be preferable to allow the jury to determine the issue of the materiality of statement under 18 U.S.C. § 1001. At the very least, it would be the better practice to simply inform the jury that the matter is not for their consideration rather than announcing its materiality, and thereby emphasizing its importance."

3. On October 12, 1984, the President signed into law the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. *et seq.*. Section 1206 of that Act (98 Stat. 2153) amended 18 U.S.C. 3731 to permit the government to appeal from new trial orders entered after verdict or judgment. On October 18, 1984, twenty-nine days after denial of its petition for reconsideration, the government filed a notice of appeal from the trial court's order granting petitioners' motion for a new trial. The Fourth Circuit consolidated the government's appeal with Nilson's pending double jeopardy appeal.

The court of appeals thereafter reversed the new trial order (Pet. App. 1a-21a), rejecting petitioner's contention that it lacked jurisdiction to hear the government's appeal. The court explained that the amendment of 18 U.S.C. 3731 was effective immediately and that the government's

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[1]Before the trial court acted, the government had filed a petition for a writ of mandamus with the Fourth Circuit requesting, inter alia, an order directing the trial court to act on the motion. After the trial court issued its order on reconsideration, the government's petition for mandamus was denied by the Fourth Circuit (No. 84-1959) without opinion on October 5, 1984.

appeal, filed within 30 days of the trial court's denial of the motion for reconsideration, was timely (Pet. App. 6a). Relying on *Mallett* v. *North Carolina*, 181 U.S. 589 (1901), the court held that application of the law in existence at the time of decision — *i.e.*, the amended Section 3731 — to this case did not constitute manifest injustice or violate the Ex Post Facto Clause (Pet. App. 10a-16a). On the merits, the court of appeals held that the trial court had erred in granting petitioners' motion for a new trial, because "fraudulent intent" is not an element of the false statement offense and materiality is a question of law to be determined by the court (*id.* at 19a-20a). The court therefore reversed the trial court's grant of a new trial and ordered the jury's guilty verdict to be reinstated. Petitioner's double jeopardy appeal was dismissed as moot (*id.* at 20a).

ARGUMENT

At the outset, we note that the decision below is interlocutory. The case has been remanded by the court of appeals for sentencing, at which point petitioners will be entitled to take their appeal, raising any claims of trial error that they may have. If they prevail on appeal, there will be no need to consider the issues presented here; if they do not prevail, those issues will still be available for review by this Court. Accordingly, it would be a departure from the normal practice of this Court to grant certiorari at this interlocutory stage. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

1. Petitioners contend (Pet. 11-18) that application of the recently amended 18 U.S.C. 3731 in this case violates the Ex Post Facto Clause, Article I, Section 9, Clause 3, of the Constitution. As the court of appeals explained (Pet. App. 10a-13a), however, this case is controlled by *Mallett* v. *North Carolina*, 181 U.S. 589 (1901). In *Mallett*, the State

appealed and obtained reversal of a new trial order pursuant to a statute authorizing such appeals that was enacted subsequent to the entry of the defendants' convictions. This Court rejected the defendants' ex post facto argument, explaining that the legislation (181 U.S. at 597):

> did not make that a criminal act which was innocent when done; did not aggravate an offence or change the punishment and make it greater then [*sic*] when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offence; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offence charged.

See also *United States* v. *Affleck*, 765 F.2d 944, 948-951 (10th Cir. 1985) (en banc) (Bail Act); *United States* v. *Draper*, 762 F.2d 81, 82 (10th Cir. 1985). Despite the court of appeals' heavy reliance on *Mallett*, petitioners do not even cite it or attempt to explain away its significance.

Even apart from *Mallett*, there is simply no reason why the Ex Post Facto Clause should bar the government's statutory appeal here. This is simply a procedural statute, and there is no prejudice to petitioners caused by the timing of its enactment. The statute does not retroactively make conduct criminal or even alter rules of evidence or trial procedure. Thus, there can be no contention that, had the statute been enacted earlier, petitioners would have acted differently, either in committing the criminal acts or in the conduct of their defense.

There is similarly no merit to petitioners' contention (Pet. 13-15) that the government's appeal here was unconstitutional because it makes petitioners worse off than if they

had not taken their double jeopardy appeal.[2] Absent vindictiveness or some other constitutional problem, there is no inherent constitutional infirmity in a result simply because it appears, with the benefit of hindsight, that the defendant would have been better off not to have appealed. See, *e.g.*, *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973). Finally, petitioners' contention (Pet. 12-13) that they have a constitutionally protected "right" to retain an erroneous new trial order cannot be countenanced. See Pet. App. 14a.[3]

Citing *United States* v. *Fernandez-Toledo*, 749 F.2d 703 (11th Cir. 1985), petitioners also contend (Pet. 15-18) that a conflict in the circuits exists on the question whether the recent amendment to 18 U.S.C. 3731 applies retroactively. We believe that *Fernandez-Toledo* was wrongly decided,[4]

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[2]This argument is premised on the supposition that if petitioners had not taken their (in our view utterly frivolous) double jeopardy appeal, their retrial would, under the Speedy Trial Act, have been held prior to enactment of the statute authorizing the government's appeal (see Pet. 14). This is wrong; the 70-day period for holding a new trial does not begin to run until "the action occasioning the retrial becomes final." 18 U.S.C. 3161(e). That did not occur until the government's timely request for reconsideration was denied.

[3]Petitioners misleadingly assert (Pet. 12-13) that the statute deprives them of the right to a new trial. The statute does not affect petitioners' right to a new trial; it simply gives the government the right to appeal a new trial order. Thus, if petitioners were legally entitled to a new trial, the statute would not operate to deprive them of one. What petitioners seek to protect is an erroneous order granting them a new trial to which they are not entitled. Moreover, petitioners do not even want this new trial; they have also asserted that a new trial would violate the Double Jeopardy Clause (see Pet. App. 3a-4a). Thus, what they really seek is the "right" to go scot-free on the charge on which they were convicted at a valid trial.

[4]The decision in *Fernandez-Toledo* has already been rejected by two other circuits (*United States* v. *Affleck*, 765 F.2d at 947-948 (10th Cir.); *United States* v. *Zannino*, 761 F.2d 52, 56-57 (1st Cir. 1985)), and its scope has been limited by the Eleventh Circuit itself (*United States* v. *Ballone*, 762 F.2d 1381, 1383 (1985)).

but, in any event, it is distinguishable from the instant case. *Fernandez-Toledo* involved a government appeal from an order granting bail, not a new trial order, and the court's decision was in terms addressed only to the Bail Act. The court did not discuss the Ex Post Facto Clause at all, and, in fact, the Eleventh Circuit in a later case has rejected the contention that immediate application of the Bail Act violates the Ex Post Facto Clause. *United States* v. *Ballone*, 762 F.2d 1381, 1383 (1985). The decision in *Fernandez-Toledo* turned on the special problems the court found inherent in the bail context — namely, the injustice it thought would occur if the substantive bail amendments were applied retroactively, coupled with the court's reluctance to give partial retroactive effect to the amendments. See 749 F.2d at 705. These problems are absent in the new trial context, where the amendment was purely procedural.

In any event, even if there were a conflict between these cases, it would not be appropriate for this Court to exercise its certiorari jurisdiction. The issue presented here is of no continuing importance. It applies only to an extremely limited class of cases — ones where a new trial order became final between September 12, 1984, and October 12, 1984, and where the government filed a timely notice of appeal from that order. Needless to say, few cases fit this description, and no more will arise in the future. Moreover, the decision below is plainly correct. Hence, review by this Court is not warranted.

2. Petitioners contend (Pet. 19-25) that the court of appeals erred in reversing the new trial order because the district court had correctly concluded that its original jury instructions were inadequate. This contention is without merit.[5]

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[5]Petitioners assert (Pet. 25-27) that the court of appeals applied a different standard of review here than it would in reviewing an appeal from a denial of a new trial. There is no basis for this assertion. The

a. Petitioners contend (Pet. 19-20) that the trial court erroneously failed to instruct the jury that "fraudulent intent" is an element of a false statement violation, 18 U.S.C. 1001. In fact, the court's instruction, to which petitioners did not object at trial, was correct. The trial court did instruct the jury that petitioners had to make a knowingly false statement in order to be convicted (see C.A. App. 268). Apparently, by "fraudulent intent" petitioners mean that the jury should have also been instructed that they would have to find that petitioners intended to defraud or otherwise influence the government. That simply is not an element of a violation of 18 U.S.C. 1001, and no court of appeals has held that it is. See *United States* v. *Yermian*, No. 83-346 (June 27, 1984), slip op. 6, 9-11; *United States* v. *Norris*, 749 F.2d 1116, 1121-1122 (4th Cir. 1984), cert. denied, No. 84-1249 (Apr. 29, 1985).[6]

b. Petitioners contend (Pet. 21-25) that the trial court erred in resolving the issue of materiality of the false statement itself, rather than submitting it to the jury.

Petitioners recognize (Pet. 22) that the court of appeals' holding that materiality is an issue of law is consistent with

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court simply found that the reasons given for the new trial were legally erroneous and hence that there was no basis for the new trial order. Nothing in the opinion suggests that the court applied a different standard of review.

[6]Petitioners assert (Pet. 20) a conflict on this issue on the basis of a Seventh Circuit decision, *United States* v. *Brack*, 747 F.2d 1142, 1146 n.4 (1984), cert. denied, No. 84-1071 (Feb. 19, 1985), that uses the phrase "fraudulent intent" in cataloging the elements of 18 U.S.C. 1001. The language in question is plainly dictum, since the convictions in *Brack* were affirmed. In any event, it seems likely that the court of appeals there was simply referring to the "knowledge of falsity" element of the offense (which is how other courts have understood the Seventh Circuit's use of the phrase, *United States* v. *Race*, 632 F.2d 1114, 1116 (4th Cir. 1980)). No case has held or suggested that a "fraudulent intent" instruction along the lines apparently contemplated by petitioners is appropriate.

the law in the majority of circuits. See, *e.g.*, *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960); *Weinstock* v. *United States*, 231 F.2d 699, 703 (D.C. Cir. 1956). The holding also accords with this Court's recognition that the materiality of false statements generally is a question for the court (*Sinclair* v. *United States*, 279 U.S. 263, 298 (1929)), and with the generally accepted pattern jury instructions (see 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977 & Supp. 1981)). Petitioners contend, however, that the Ninth and Tenth Circuits have approved the practice of submitting the question of materiality to the jury (citing *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982) and *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979)) and that this conflict warrants resolution by this Court.

Petitioners have cited no case, however, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not submitted to the jury. The Tenth Circuit has approved the practice of submitting it to the jury (*Irwin, supra*); the Ninth Circuit has characterized the failure to do so as error, but has nevertheless affirmed the convictions in question because materiality had been so clearly established (*Valdez*, 594 F.2d at 729). In this case, petitioners cannot seriously contest the materiality of their false statement that there had been no collusion on the bid to the Army contracting authority. It is clear that petitioners' false statement of independent price determination filed with the Army contracting authority "had a 'natural tendency to influence, or

[was] capable of affecting or influencing, a governmental function' " (*United States* v. *Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982), quoting *United States* v. *Markham*, 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977)).[7] Where the materiality of petitioners' false statements is so clearly established, there is no reason to believe that any other court of appeals would have granted petitioners the relief they seek. Thus, to whatever extent a conflict may exist,[8] the present case does not provide an appropriate occasion for this Court to address it. This Court has denied certiorari on other recent occasions in cases raising this issue (see *United States* v. *Abadi, supra*; *Isenberg* v. *United States*, 714 F.2d 118 (2d Cir. 1982) (Table), cert. denied, 461 U.S. 926 (1983)), and there is no reason for a different result here.

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[7]An employee of the Army contracting authority testified at trial that the Army would not process rate increases such as Nilson's in this case, and would not allow the new rate to go into effect, without a completed certificate of independent price determination signed by the bidder (C.A. App. 90).

[8]The Ninth Circuit has recently held that materiality is an issue of law to be decided by the court in prosecutions for false statements under 26 U.S.C. 7206(1) (*United States* v. *Flake*, 746 F.2d 535, 537 (9th Cir. 1984), cert. denied, No. 84-6013 (Feb. 19, 1985)), and in prosecutions for perjury under 18 U.S.C. 1623 (*United States* v. *Prantil*, 756 F.2d 759, 769 (9th Cir. 1985)). It is not clear whether these holdings presage acceptance of the prevailing view on false statement prosecutions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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